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CONCORD, N.H.

1951

Nov. 8

Governor Sherman Adams
State House

Dear Sir:

At a recent meeting of the Governor and Council, requests for sums from the emergency fund were made by the Veterans Council and by the State Board of Fire Control. The former agency desired money for the purpose of hiring an additional Service Officer; the latter, in order to print and distribute regulations governing the installation of liquefied petroleum facilities. You have asked this office to determine if the use of the emergency fund is authorized in these circumstances. In addition to an attempt to provide an answer for these specific instances, there follows a discussion of principles believed generally applicable in connection with the expenditure of the fund.

The emergency fund is established and maintained under the provisions of R. L. c. 27, s. 44 as amended by the Laws of 1949, c. 321. This statute prescribes the method of the use of the fund, and specifies the purposes for which it may be employed. We are here concerned with the latter.

Three purposes for which the fund may be used are set forth in the law. The first of these is "to aid any state department in any emergency which may arise"; the second "to supplement any appropriation made by the general court which shall prove inadequate to carry on essential functions of government"; and finally "to protect the interests of the state".

Although out of order, I should like to consider the second clause first; "to supplement any appropriation made by the general court which shall prove inadequate to carry on essential functions of government". Inadequacy is easily shown, since it involves merely a mathematical concept; what are "essential functions of government" entails an entirely different consideration. In the absence of other

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November 8, 1951

Gov. Sherman Adams

definition and as a reasonable and logical determination, we may consider as essential functions of government those functions, activities and processes which the people in the Constitution and the Legislature in its enactments have directed to be undertaken.

Functions prescribed in the Constitution, to the extent that the Constitution is self-executing, can be determined by an examination of the instrument itself. Thus, when the Secretary of State, for example, keeps the records of the State in his office and attends the Governor and Council in meeting (Const. Pt. Second, Art. 68), he is performing an essential function of government, and one need look no further. But one cannot state, upon a mere inspection of a general statute prescribing the duties and activities of a given department, that all such duties and activities are to be deemed essential functions of the government. Such statutes may be modified by implication, by later acts in different forms; specifically, by acts of appropriation. Thus, if a statute is enacted which directs a department to undertake a given activity, one may reasonably say that at the time of such enactment the activity was considered an essential function of government. This on the ground that the Legislature is not to be taken as having directed the doing of frivolous, useless and inessential acts. But if at the same or at a later session no funds are appropriated with which to carry on the activity in question — and especially if the department has requested funds for the activity only to be flatly refused them by the Legislature, — then it must be taken that the activity is no longer considered an "essential function of government". The Legislature did not deem it essential, else it would have provided funds for it. And in the absence of specific refusal of funds requested for given statutory functions, but with a general reduction in the total appropriations to an amount below which the department feels necessary to carry out its duties prescribed under a general statute, it seems reasonable to interpret such reduction as a legislative directive to the department head that only such of the statutory duties as may be accomplished by means of such reduced funds shall be undertaken. In other words, that only the most important of the statutory duties will be carried on, and these to the fullest measure, or that all activities prescribed by law will be embarked upon, but on a reduced scale consistent with the funds available. As a corollary to this line of reasoning, activities which cannot be carried on with the funds appropriated are, by the legislative mandate, not to be undertaken. Those that can be, are to be. Thus we arrive, again, at the definition of the phrase "essential functions of government".

Using, then, in addition to the line items in the appropriation acts themselves, such extrinsic aids to determine the legislative intent as may be available — as, for example, the notes of the Legislative Budget Assistant taken at the meeting of the Appropriations Committee — one may in many instances determine what the Legislature considered essential functions of government. In other cases, reliance must be had upon the

November 8, 1951

Governor Sherman Adams

department head to state which activity he has felt called upon to abandon or to reduce in scope because of the legislative mandate to that effect implied in a generally reduced budget.

In drafting the emergency fund statute, it was envisioned that the funds appropriated for the accomplishment of essential functions of government might "prove inadequate". That, given the enumerated activities or the general level of activities as established by the general statutes and modified by the appropriation acts interpreted as described above, yet nevertheless, these activities in their reduced number or restricted scope cannot be carried on in the manner contemplated by the Legislature with the funds provided. Such a condition may come about in a number of ways. There first comes to mind as a principal cause, a general continuing rise in the price of equipment or materials required to perform the function. An error in judgment or in computation on the part of the department head when asking for funds for the activity suggests itself as another. Obstacles which might have been foreseen but which were not and which prevent carrying on the function in the manner the Legislature intended, are still a third.

Turning now to the first of the purposes for which the fund may be used; "to aid any state department in any emergency which may arise". The word "emergency" has acquired no peculiar meaning in the law; the ordinary meaning of the word is to be ascribed to it as it stands in the statute. R. L. c. 7, s. 2. It is defined by Webster as "an unforeseen combination of circumstances which calls for immediate action . . .". The words "may arise" found in the context tend to prove that this was the sense in which the word is used in the law. Reference is thus had to circumstances, unforeseen at the time the appropriation act was passed; provision is made for meeting them by resort to the emergency fund. But it cannot be that every unforeseen combination of circumstances which confronts the department during the fiscal year warrants a resort to the fund. Consideration must be given to those things which the Legislature intends the department to do. The unforeseen combination of circumstances requiring immediate action must, in general, be in respect to and relate to authorized activities. Of the emergency, it must be able to be said — based on what the Legislature actually did and on available evidence as to what it might have done if apprised — that the Legislature would have granted the requested funds if the emergency actually could have been foreseen, had been foreseen, and was fully explained to it. This would perhaps, under extreme circumstances upon clear evidence, permit the use of the fund for statutory activities for which no funds had been appropriated — but as noted, this because no man could have foreseen the need now presented and upon the basis of the evidence authorizing the assumption that the Legislature, if advised, would have provided the necessary funds.

The final clause of R. L. c. 27, s. 44 as amended, authorizes the use of the fund to protect the interests of the state". The political

November 8, 1951

Governor Sherman Adams

relations of the state in respect to its citizens being included in the foregoing, these "interests" may logically be held to be limited to the State's proprietary interests as against its own people, and to its possessory and political interests vis-a-vis the other states and the federal government. In this area no guide is prescribed; the responsibility is placed directly upon the shoulders of the Governor and Council to determine, first, what the interests of the State really are, and how much is to be spent in their furtherance. Generally, no guide will be needed; the need for protection will be self evident. It arises when it becomes clear that the property of the State is endangered, or that its standing relative to the other states and the federal government may be weakened unless appropriate steps are taken.

Coming, then, to the specific requests now before the Governor and Council. In the one case, that of the Veterans Council, the request is for funds with which to pay an additional Service Officer. Examining the budget submitted to the Legislature on February 15, 1951, it appears that salaries for three Service Officers were requested. The notes of the Legislative Budget Assistant, taken together with the Appropriation Act itself, show that the salary of one such officer only was provided. It would appear, thus, consistently with the principles set forth above, that the Legislature desires Veterans Council to undertake only such activities as can be accomplished with one Service Officer; such only are its "essential functions of government". The appropriation provided the Council is not inadequate for this activity. At least no evidence is presented that the work contemplated to be done through one Service Officer cannot be done because of an inadequacy of funds. Nor is any emergency, in the sense shown above, indicated.

Additional facts will be required before it can be determined whether the other case, that of the State Board of Fire Control, comes within any of the authorized purposes of the emergency fund. It may be, for example, that the uses of liquefied petroleum gas has markedly and unexpectedly increased since the adjournment of the Legislature. In such case, considering the nature of the duties of the Fire Marshal's office with a primary purpose of preserving life and property, an emergency may reasonably be found. Or, if it is discovered that the Legislature contemplated the issuance of all needful regulations but that such regulations cannot be issued with the funds which the Legislature, believing adequate, appropriated, then consideration may be given to granting them under the second clause of the statute. But if, on the other hand, all facts were before the Legislature and that body made a general reduction in funds for the purpose of issuing regulations, it may be necessary for the department to make the decision of what regulations it will issue, what regulations it will omit, consistent with the reduced funds.

In conclusion, it must be stated that in the emergency fund the Legislature has left much responsibility on the Governor and Council.

Governor Sherman Adams

November 8, 1951

The foregoing attempts, by the application of principles of logic, to define certain broad, sound bases for the use of the Governor and Council in their efforts to employ the fund in accordance with the legislative wishes; it is recognized, however, that perhaps the larger number of cases will fall outside the bases described but will be so pressing as to demand favorable action in respect to the use of the fund. In the last analysis, the discretion of the Governor and Council based upon good business judgment, will be the ultimate determinant.

Very truly yours,

Warren E. Waters
Assistant Attorney General

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